

Spiegel



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of:        Mariah Associates, Inc.  
File:                B-231710  
Date:                October 17, 1988

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### DIGEST

1. Post-award protest concerning alleged improprieties apparent from the solicitation is untimely because under General Accounting Office Bid Protest Regulations such protests must be filed prior to the closing date for receipt of proposals.
2. Allegation that agency evaluators may have potential conflicts of interest because of personal or professional relationships with awardee or protester is not sufficient to justify overturning the award, since the record contains no evidence of bias or preferential treatment toward awardee in the evaluation process.
3. Offeror's employment of the spouse of a former government employee is not improper where there is no evidence in the record that actions of the employee, either before or after she left the agency, resulted in prejudice for, or on behalf of, the offeror.
4. The Competition in Contracting Act of 1984 prohibits contracting agencies conducting negotiated procurements from awarding a contract on the basis of initial proposals to other than the lowest overall cost offeror.

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### DECISION

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Mariah Associates, Inc., protests the award of a requirements contract to the University of New Mexico (UNM) under request for proposals (RFP) No. DACW47-88-R-0001, issued by the Army Corps of Engineers (Corps), Albuquerque District, New Mexico, for a cultural resource services project to conduct historical archaeological studies. Mariah has alleged a number of deficiencies in the procurement. We dismiss the protest in part, deny it in part, and sustain it in part.

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The procurement is to mitigate the adverse effects on historic cultural resources resulting from the construction of a flood control dam in New Mexico. The RFP calls for proposals for detailed archaeological data recovery and related historical documentary studies of specified sites in New Mexico.

Three firms, including UNM and Mariah, submitted proposals by the January 12, 1988, closing date. The Corps evaluated the proposals and determined that all three were technically acceptable. Mariah's proposed price was lower than UNM's, but UNM's proposal received a higher technical score than the second ranked Mariah proposal (84 versus 74 technical points). Since UNM received a superior price per technical point rating, the contracting officer awarded the contract to UNM without conducting discussions, on the basis that it offered the best value to the government. Upon learning of the award and obtaining a debriefing, Mariah protested and performance was continued only to complete one issued delivery order, and was suspended thereafter pending the disposition of this protest.

#### SOLICITATION IMPROPRIETIES

Mariah protests that the RFP was not set aside for small business, and objects to the allegedly irrational relationship between the scope of work and the evaluation criteria. Our Bid Protest Regulations require that protests based upon alleged improprieties in a solicitation that are apparent prior to the closing date for receipt of proposals must be filed prior to that date. 4 C.F.R. § 21.2(a)(1) (1988); Lundlin Construction, Inc., B-226209, Feb. 20, 1987, 87-1 CPD ¶ 198, HSQ Technology, B-219410, Sept. 18, 1985, 85-2 CPD ¶ 300. Since Mariah was aware of the alleged deficiencies prior to the time it submitted its proposal, its post-award protest is dismissed as untimely.

#### CONFLICT OF INTEREST

In its initial protest letter, Mariah alleges that members of the technical proposal evaluation committee may have had conflicts of interest because of personal and professional relationships with the UNM or Mariah. The protester, however, has made no showing of possible bias or preferential treatment on the part of the evaluators in favor of UNM. See Bell Technical Operations Corp., B-225819, et al., May 21, 1987, 87-1 CPD ¶ 534. In fact, we note that some of the alleged relationships appear to be types that could properly arise whenever a commercial firm has done work for a particular government agency in the past. Since the record contains no evidence of bias or

preferential treatment toward UNM by the evaluators, and because the protester's mere suspicion and innuendo regarding potential conflicts of interest do not justify overturning the award to UNM, the protest is denied on this issue. Id.

Mariah also points out that the husband of a former Corps employee whose responsibilities included oversight over Mariah's prior Army contract for historical archaeological studies, and who may have participated in some aspects of the competition, is now proposed for employment by UNM. Until leaving the Corps in October 1986, the wife was the contracting officer's technical representative. In this capacity, she was responsible for issuing work orders and negotiating cost levels for a prior contract between the Corps and Mariah. Mariah argues that UNM's employment of the husband of a former government employee as its co-principal investigator constitutes a conflict of interest violation requiring the rejection of UNM's proposal.

We have consistently held that the interpretation and enforcement of post-employment conflict of interest restrictions are primarily matters for the procuring agency and for the Department of Justice. Our general interest, within the confines of a bid protest, is to determine whether any action of the former government employee may have resulted in prejudice for, or on behalf of, the awardee. Regional Environmental Consultants, B-223555, Oct. 27, 1986, 66 Comp. Gen. \_\_\_, 86-2 CPD ¶ 476, aff'd on reconsideration, B-223555.2, Apr. 21, 1987, 66 Comp. Gen. \_\_\_, 87-1 CPD ¶ 428.

Many of Mariah's arguments are in the form of speculative assertions. Mariah does not identify any specific statute or regulation which has been violated and we are not aware of any prohibition which extends to the spouses of former government employees. We find that Mariah's allegation does not provide a basis to question the award. The spouses' government employment ended before issuance of the solicitation and submission of proposals. Moreover, there is no evidence that any action of the former government employee resulted in an improper advantage for UNM, no evidence demonstrating that she was afforded access to internal agency information concerning the procurement, and no evidence that her prior employment otherwise improperly influenced the award selection. Our Office has held that the mere fact that a former government employee is subsequently employed by a company awarded a contract is an insufficient basis to challenge the award where there is no evidence that the former employee improperly influenced the

award. Holsman Services Corp., B-230248, May 20, 1988, 88-1 CPD ¶ 484. Since Mariah has produced no evidence that the former Corps employee improperly influenced award of the contract, this portion of its protest is denied.

#### BIAS

Mariah also alleges that the Corps orchestrated the procurement process to take the contract from small businesses such as Mariah and to award the contract to a large business like UNM. In cases where bias is alleged, the protester has the burden of affirmatively proving its case and unfair or prejudicial motives will not be attributed to procurement officials on the basis of inference or supposition. Washington State Commission for Vocational Education--Reconsideration, 64 Comp. Gen. 681 (1985), 85-2 CPD ¶ 59. Concerning the alleged bias against small businesses, Mariah has presented no substantive proof establishing bias on the part of procurement officials. Where, as here, written records fail to demonstrate bias, the protester's allegations are properly to be regarded as mere speculation. Id.

#### AWARD WITHOUT DISCUSSIONS

The RFP stated that the government would award the contract to the responsible offeror whose offer conforming to the solicitation is the most advantageous to the government, cost or price or other factors considered. Under the RFP, offerors were required to submit both technical and cost proposals. The RFP further stated that the contract may be awarded to other than the lowest offer. Finally, the RFP stated that the government might award a contract on the basis of initial offers received without discussions. The Corps' states that:

"Despite the fact that UNM did not submit the lowest cost proposal, the [Corps] nevertheless awarded the contract to UNM based on its total combined price per technical point ratio . . . , although . . . Mariah or Chambers could have supplanted UNM as the best value offeror under the RFP's criteria had they been advised of informational deficiencies or ambiguities in their proposals."

The Corps concedes that it improperly awarded the contract to a firm other than the lower cost technically acceptable offeror on the basis of initial proposals. Under the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2305(b)(4)(A)(ii) (Supp. IV 1986), agencies have limited

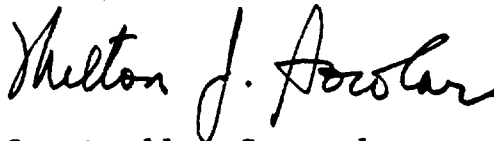
discretion to make award on the basis of initial proposals without discussions. We have recognized an exception to the general requirement that agencies must conduct discussions in a negotiated procurement in that the requirement need not be met when it can be clearly demonstrated from the existence of full and open competition or accurate prior cost experience with the product or service that acceptance of the most favorable initial proposal without discussions would result in the lowest overall cost to the government. United Telecontrol Electronics, Inc., B-230246, June 21, 1988, 88-1 CPD ¶ 590. However, by its express use of the term "lowest overall cost," CICA prohibits an agency from accepting an initial proposal where there is another technically acceptable proposal in the competitive range at a lower cost. Id.

Accordingly, we sustain the protest on this issue.

#### CORRECTIVE ACTION

Where an improper award has been made, termination and reopening of negotiations are appropriate notwithstanding the disclosure of an offeror's proposal. The Faxon Company, B-227835.3, et al., Nov. 2, 1987, 67 Comp. Gen. \_\_\_\_\_, 87-2 CPD ¶ 425. The Corps advises that the contract is funded with an option to extend the procurement through December 31, 1989, and is largely unexecuted. Therefore, we are recommending that performance remain suspended and that discussions be conducted with all offerors whose proposals are within the competitive range to allow for the submission of revised proposals. We further recommend that UNM's contract be terminated for the convenience of the government if it is not the successful offeror at the conclusion of these discussions. In addition, since we sustain the protest on this ground, Mariah is entitled to recover the costs of filing and pursuing the protest. Bid Protest Regulations, 4 C.F.R. § 21.6(d)(1) (1988).

The protest is dismissed in part, denied in part, and sustained in part.



Acting Comptroller General  
of the United States